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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-6891
(A-924)

FREDDIE F. DAVIS, Petitioner,

v.

STATE OF GEORGIA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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June 21, 1979

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IN THE

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October Term 1978

No. 78-

FREDDIE F. DAVIS,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner Freddie F. Davis respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia affirming his sentence of death for murder.

OPINION BELOW

The opinion of the Supreme Court of Georgia affirming petitioner's conviction and sentence is reported at 240 Ga. 763, 243 S.E. 2d 12 (1978) and at ___ Ga. ___ 252 S.E. 2d 443 (1979).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3). The judgment of the Supreme Court of Georgia was entered on June 28, 1978. This petition is timely filed since on April 29, 1979, Mr. Justice Powell granted an extension of time in which to file through and including June 23, 1979.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

AMENDMENT V, UNITED STATES CONSTITUTION:

> ...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...

AMENDMENT VIII, UNITED STATES CONSTITUTION:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

AMENDMENT XIV, UNITED STATES CONSTITUTION:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GEORGIA CODE ANNOTATED SECTION 27-2534.1:

> ...In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:...The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony...The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim...The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing of the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt....

QUESTIONS PRESENTED

1. Whether petitioner is twice put in jeopardy by the state's alleging new "aggravating circumstances" at a new sentencing trial after appellate reversal of the original sentence of death.

2. Whether the state may seek a more severe sentence upon petitioner by alleging new "aggravating circumstances" for the first time at the second sentencing trial when no reasons for doing so affirmatively appear.

3. Whether the use in evidence of three statements made by petitioner was proper when the warnings required by Miranda v. Arizona were not given until after the second statement; were incomplete; and when the prosecution fails to show comprehension as well as relinquishment.

4. Whether the death penalty may be constitutionally imposed on the basis of jury instructions that: (a) fail to instruct the jury to focus on the characteristics of the defendant as well as the nature of the crime, (b) fail to explain the term "mitigating", or to direct the jury's attention to specific mitigating circumstances present in the case and (c) do not guide the jury to weigh mitigating circumstances against aggravating circumstances.

5. Whether, where the trial judge must follow a jury death verdict, it is constitutional for the court to suggest to the jury that its function is only to "recommend" death or life.

6. Whether the statutory "aggravating circumstance" upon which the jury relied in deciding upon death is so overbroad and vague that petitioner's sentence based upon this statutory provision was unconstitutional.

7. Whether the Georgia Supreme Court has failed to follow the appellate review process which this Court assumed in Gregg to be necessary to the constitutionality of the Georgia statutory scheme.

STATEMENT OF THE CASE

The charge for which petitioner was arrested, tried, and convicted and sentenced to death was that he acted in concert with Eddie Spraggins to rape and murder Frances Coe. The Supreme Court of Georgia affirmed the murder conviction and rape conviction in 1978 but vacated and reversed the imposition of the sentence of death as a result of inadequate jury instructions.[1]

At petitioner's first sentencing trial, the state alleged only the "aggravating circumstance" of "commission of an additional capital felony, to wit, the rape of Frances Coe"[2] and on that basis, the jury recommended a death verdict. After reversal of the death sentence on direct appeal, Davis v. State, 240 Ga. 763, 243 S.E. 2d 12 (1978), at the new sentencing trial, the state added the allegation of "aggravating circumstances" that the offense was "outrageous, wantonly vile, inhuman and involved torture and depravity of mind...and aggravated battery..."[3] Adding this second allegation involved no new evidence and in fact resulted in the use of the same witnesses and same testimony as at the first trial.[4] No reason of any kind appears in the record for the addition of this new, second allegation of "aggravating circumstances" at the re-sentencing trial.

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[1] Petitioner received a life sentence for the rape conviction.

[2] Page 283 of transcript of first trial in 1977. (hereinafter referred to as "Tr.")

[3] Page 363 of transcript of re-sentencing trial in 1978 (hereinafter referred to as "2d Tr.")

[4] "Because the evidence which was presented at the trial for re-sentencing is identical to that which this court previously considered in 240 Ga. 762 Appellee will not endeavor to set forth that evidence on appeal." Brief on Behalf of Appellee by the Attorney General. p. 2.

The jury instructions on sentencing and the death penalty[5] gave no examples of "mitigation"; did not attempt to define or explain the "outrageous, wantonly vile..." instruction; asked the jury only to "recommend"; and contained the other defects discussed infra.

During presentation of the evidence, the investigating police officer was allowed to testify concerning three statements given by the petitioner. The first statement was given at home - petitioner was not a suspect supposedly - and no warnings of constitutional rights were given.[6] The second statement was taken at the police station[7] when obviously the police did not believe the first statement. No warnings of constitutional rights were given the defendant until after he made this second statement.[8] In this statement, petitioner admits going to the home of the deceased with the co-defendant Spraggins knowing that a robbery was planned; admits an assault on the deceased by Spraggins; admits knowledge of sexual assault; and gives the police knowledge of physical evidence which is used at the trial.[9] Constitutional warnings were given before the third statement where petitioner admitted killing the deceased but these warnings were incomplete.[10]

All three of the statements by petitioner were used in evidence against petitioner at the re-sentencing trial.[11]

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[5] 2d Tr. pp. 353-362.

[6] 2d Tr. p. 147.

[7] 2d Tr. p. 148.

[8] 2d Tr. pp. 149, 142.

[9] 2d Tr. pp. 149-150.

[10] 2d Tr. p. 152.

[11] 2d Tr. pp. 142, 147, 149-152.

Based on the above, the re-sentencing jury "recommended" death and petitioner was sentenced to death.[12]

The Supreme Court of Georgia affirmed the death sentence. The Supreme Court of Georgia decided and rejected the double jeopardy/due process arguments, the Miranda warnings argument and the arguments concerning the death penalty and the jury instructions.[13]

Original counsel for petitioner then withdrew or declined to continue his representation and present counsel for petitioner was obtained at the request of petitioner through the assistance of the NAACP Legal Defense and Educational Fund, Inc.

[12] 2d Tr. pp. 363-364.

[13] 252 S.E. 2d 443.

REASONS FOR GRANTING THE WRIT

In 1972, this Court held that death penalty statutes, as then administered, were unconstitutional. Furman v. Georgia, 408 U.S. 238. In 1976, this Court ruled that, while some new death penalty statutes were unconstitutional, e.g., Woodson v. North Carolina, 428 U.S. 280, others, including Georgia's, appeared on their face to contain sufficient safeguards, so that they could be applied constitutionally, e.g., Gregg v. Georgia, 428 U.S. 153.

Now the question arises as to how the Georgia scheme is actually being administered - not at all the way this Court assumed in Gregg. Thus, petitioner - at peril for his life - asks this Court to carry forward what it began, to the necessary next step - i.e., this Court should require that the safeguards which it has held can make the death penalty constitutional be rigorously observed and applied. It should hear the case to grant this particular petitioner his constitutional rights before imposition of the "unique and irretrievable" penalty of death. Woodson, 428 U.S. at 281 It should also resolve these issues now because the Georgia Supreme Court - itself closely divided on the constitutional questions raised herein - now faces a "tide" of death penalty cases.[14]

Finally, this case raises important questions of double jeopardy/due process with respect to a new death sentencing trial after reversal of the original death sentence and the use of interrogation obtained statements at the hearing without proof of compliance with Miranda v. Arizona.

[14] See the dissent in Spivey v. Georgia, 241 Ga. 477, 246 S.E.2d 285, 293, cert. denied, __ U.S. __, No. 78-5544, slip op. (Nov. 27, 1978).

I.

THE STATE SHOULD NOT BE ALLOWED TO PUT PETITIONER TWICE IN JEOPARDY BY ADDING NEW ACCUSATIONS OF "AGGRAVATING CIRCUMSTANCES" AT A NEW SENTENCING TRIAL AFTER APPELLATE REVERSAL OF THE ORIGINAL SENTENCE OF DEATH.

By allowing the state to add the new allegation of "outrageous, wantonly vile..." as an aggravating circumstance at the re-sentencing trial, the trial court allowed an attempt to appeal to the passion and prejudice of the jury and allowed the state to punish the petitioner for pursuing his original appeal.

The common law prohibited a second punishment for the same offense as well as forbidding a second trial for the same offense. Ex parte Lange, 18 Wall. 163, at 169. This Court has long held that under certain circumstances a defendant may be re-tried after a reversal of his conviction, Ball v. United States, 163 U.S. 662.[15] However, due process compels that a trial court not allow vindictive deterrence of appeals by permitting the state to deliberately seek enhancement at sentencing:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation... North Carolina v. Pearce, 395 U.S. 711.

The same considerations as were applicable in Ashe v. Swenson, 379 U.S. 436 also indicate here that the state's addition of another "aggravating circumstance" should not be allowed. An examination of the record of the first trial and a comparison of the record at the second trial reveals the state to have used the same evidence and same witnesses at both

[15] But see Burks v. United States, 473 U.S. 1 and Greene v. Massey, 437 U.S. 19.

proceedings - a fact admitted by respondent.[16] They simply added the "outrageous, wantonly vile..." allegation the second time around for good measure in order to justify a reconsideration of evidence that did not and could not relate to the commission of another capital offense factor which was used the first time. The state of Georgia should not be allowed to stack the deck in this fashion in order to obtain a death verdict.

[16] See footnote number 4.

II.

THE STATE'S NEW ACCUSATIONSOF "AGGRAVATING CIRCUMSTANCES" AT THE RE-SENTENCING TRIAL WITHOUT AN AFFIRMATIVE SHOWING OF REASONS FOR SAME OFFENDS DUE PROCESS.

The burden of persuasion as to whether legitimate reasons existed at the re-sentencing trial for adding the new accusation - or whether it was simply a punitive measure to allow use and introduction of evidence to appeal to the passion and prejudice of the jurors - rests upon the state. Only the prosecutor was in a position to know and reveal why the new accusation was added after the successful appeal. Due process should command that affirmative reasons appear in the record when petitioner's life is at stake - just as is required when a judge chooses to impose a different and harsher sentence upon re-trial. North Carolina v. Pearce, 395 U.S. 711.

III.

THE USE IN EVIDENCE OF THREE STATEMENTS BY PETITIONER WAS IMPROPER WHEN MIRANDA WARNINGS WERE NOT GIVEN UNTIL AFTER THE SECOND STATEMENT AND THE WARNINGS WERE INADEQUATE.

Miranda v. Arizona, 384 U.S. 436 (1966) requires that whenever an individual is taken into custody or otherwise deprived of his freedom in any significant way and is subjected to questioning, he must be advised of his privilege against self-incrimination; his right to an attorney; and related rights. The right to Miranda warnings specifically includes statements which are meant to be exculpatory for they can also be highly incriminating.

The first time petitioner was questioned he was at his home. The second time, however, he had been taken to the Manchester, Georgia Police Station.[17] It is difficult to imagine that a young (19 year old) ill educated man being questioned in rural Georgia about a rape - murder did not feel and suffer under the coercive atmosphere criticized in Miranda v. Arizona. The result of this second questioning was for petitioner to make a statement which was highly damaging and which was used against him at trial. Only after these admissions by the petitioner did the police then belatedly give Miranda warnings.

This second statement by petitioner was followed by a thrid interrogation where Miranda warnings were given prior to interrogation. However, neither the warnings given after the second statement or before the third statement were complete. Both times the police investigator gave the Miranda warnings from memory[18] and both times the investigator totally failed to

[17] 2d Tr. p. 148.

[18] 2d Tr. p. 144.

advise petitioner that he had the right to have the interrogation cease at any time even after questioning began. Miranda v. Arizona, 384 U.S. 436 at 444-45, 473-74.

The continuing, serial progression of these three statements from the petitioner - each of which implicate the petitioner more strongly - demonstrate the dramatic effect on petitioner and the impact at his death sentencing trial of the prosecution's failure to give timely or adequate Miranda warnings.

Finally, there is simply no evidence in this record to support a finding that this 19 year old youth waived his right to remain silent or his right to a lawyer. Proof of waiver by the state of Georgia should have included (but did not) proof of understanding of the rights and "comprehension" as well as "relinquishment". Brewer v. Williams, 423 U.S. 1031.

THE JURY INSTRUCTIONS APPROVED BY GEORGIA'S SUPREME COURT ARE FLATLY INCONSISTENT WITH THIS COURT'S RECENT RULINGS AS TO WHEN A DEATH SENTENCE MAY CONSTITUTIONALLY BE IMPOSED

It is "quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." Gregg v. Georgia, 428 U.S. 153, 193 (1976). In death cases, moreover, as this Court recognized long before its wider rulings in Furman, doubts about the clarity of instructions should be "resolved in favor of the accused". Andres v. United States, 333 U.S. 740, 752 (1948). See also Calton v. Utah, 130 U.S. 83, 87 (1889) ("fundamental" in cases involving death that instructions be clear and explicit).

Although criminal defendants are entitled to instructions clear to laypersons as well as legal scholars, Taylor v. Kentucky, 436 U.S. 478, 484 (1978), it is particularly true in death cases that instructions should be (as Mr. Justice Frankfurter put it) in clear "simple colloquial English", and (as then Chief Judge Cardozo wrote) given "directly and not in a mystifying cloud of words".[18A]

The instructions below do not pass those general tests. More specifically, they depart in four separate but reinforcing respects from the very elements of the Georgia statutory scheme which this Court in Gregg held saved that scheme from constitutional attack.

A. The Jury Was Not Told Its Decision on Life or Death Must Include Focus on the Particular Characteristics of the Defendant.

The instructions leading to the death verdict against petitioner did not clearly express the need to weigh the petitioner's particular characteristics, as well as the specific circumstances of the crime. Thus, they conflict with:

[18A] The first quote is in the Justice's concurring opinion in Andres, 333 U.S. at 766; the second from Law and Literature (1931) cited in McGautha v. California, 402 U.S. 183, 199 (1971).

(i) Gregg and the other 1976 decisions holding that certain death penalty statutes can, if properly administered to focus on the individual defendant, meet the requirements of the Constitution;[19]

(ii) Woodson and the other 1976 decisions holding mad-datory death penalty statutes unconstitutional because they exclude consideration of mitigating factors and the circumstances of the defendant;[20] and

(iii) Locket v. Ohio, which held that in death cases the sentencing authority must be given a "full opportunity" to consider "mitigating circumstances", including "any aspects of the defendant's character and record". 98 S. Ct. 2954.

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19. E.g.:
(i) In Gregg, this Court emphasized the constitutional obligation to focus specifically on the defendant in at least six places in the plurality opinion. 428 U.S. at 189-90, 190,192, 197, 199 and 206.
(ii) In Jurek v. Texas, 428 U.S. 262 (1976) this Court upheld the statute because it "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death". 428 U.S. at 274 (emphasis added).
(iii) In Proffitt v. Florida, 428 U.S. 242 (1976), the statute was hled constitutional in part because the sentencing authority must "focus" on the "circumstances of each individual homicide and individual defendant". Id. at 258.

20. See:
(i) E.g., Woodson v. North Carolina, 428 U.S. 280 (1976), "A process that accords no significance to relevant facets of the character and record of the individual offender" is unconstitutional because it excludes from consideration the possibility of "compassionate or mitigating factors stemming from the diverse frailties of humankind." Id. at 304.
(ii) Roberts v. Louisiana, 428 U.S. 325 (1976) ("no meaningful opportunity" for "consideration of mitigating factors" presented by "the particular crime or by the attributes of the individual offender".) Id. at 333-34.

B. The Term "Mitigating" Was Not Sufficiently Defined for the Jury and Concrete Examples of Mitigating Circumstances Were Not Provided.

The only attempt at any explanation by the trial court to guide and direct the jury on the meaning and definition of the term "mitigating" was the following:

> Mitigating circumstances are those circumstances which do not constitute a justification or excuse for the crime, but which may be considered as extenuating or reducing the morale, culpability or blame.

This one sentence falls far short of the careful, adequate and suitable guidance and direction that is constitutionally required, especially in its oblique references to such things as "morale" instead of "moral".

In addition, this Court's decisions - and a fair reading of the Constitution - call for more than a definition of "mitigating". They require that particular mitigating factors relevant in light of the record such as age and others, be called to the jury's specific attention as examples of what they could weigh against the aggravating circumstances which the Court called to the jury's attention.

In Gregg, this Court assumed that such factors would be specifically called to the sentencing authority's attention. Under a fair reading of the constitutional requirements in death cases they clearly should be.

The Georgia statute states flatly that the trial judge "shall include" in his instructions "any mitigating circumstances". Ga. Code Ann. §§ 27-2534.1. This Court in upholding the Georgia scheme, repeatedly assumed that that would, and should be done. 428 U.S. at 164, 192, 193, 194 n.44,[21] 197. Indeed, in one of the many passages which state that the jury's attention must be "focused on

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21. In the body of the opinion the court rebutted the contention that standards to guide a jury's discretion could not be formulated by referencing the Model Penal Code's listing of the "main circumstances" of mitigation and aggravation which "should be weighed and weighed against each other."

the characteristics of the person who committed the crime" (point A above), this Court gave examples of what it expected the jury's attention to be "focused" upon. Those included factors present in this case - i.e., "any special facts about this defendant that mitigate against imposing capital punishment (e.g., his youth...)" Id., at 197. [22]

C. The Jury Also Was Not Informed That It Should Weigh "Mitigating" Circumstances Against Aggravating Circumstances.

Apart from not defining the legalism "mitigating" for the jury or providing particularized examples, the jury instructions are also constitutionally deficient in that the jury was not specifically informed that it should weigh mitigating against aggravating circumstances, 428 U.S. at 248 - 251, 258. Similarly, in Jurek the question which a jury must answer before imposing the death sentence necessarily requires such balancing. This Court in Coker also assumed such an instruction was required, 433 U.S. at 89-91.

While a particular form of words may not constituionally be required, surely it is not constitutional to have the jury totally at sea as it was left here.

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22. That focus upon mitigating circumstances can make a life or death difference is evident from the following analysis of the pool of cases available to the Supreme Court of Georgia for comparison purposes at the end of 1977:

(i) 36 of the 48 offenders for whom either youth, or lack of a prior criminal record was reported as a mitigating factor by the trial judge (where the death penalty was imposed), or by the court's assistance (where it was not), received life sentences.

(ii) The two offenders for whom both youth and no prior record were reported received life sentences (despite the fact that in both cases (Sanders v. State, 235 Ga. 425, 219 S.E.2d 768 (1976) and Stoval v. State, 236 Ga. 840, 225 S.E.2d 292 (1976) the offenders were found guilty of brutal murders.

V.

THE DEATH PENALTY INSTRUCTIONS ALSO RAISE THE IMPORTANT AND RECURRING QUESTION AS TO WHETHER, WHERE THE STATUTORY SCHEME PROVIDES THAT THE JURY'S DECISION ON DEATH MUST BE FOLLOWED BY THE TRIAL JUDGE, THE JURY MAY NONETHELESS BE LED TO BELIEVE THAT ITS ROLE IS ONLY TO "RECOMMEND" OR "ASK" FOR DEATH.

If a Georgia jury votes in favor of death the trial judge must order execution. [23]

Here, however, the trial judge's statement to the jury as to its role was that it must decide whether to recommend the death penalty.

The death penalty is unique and irreversable. The "responsibility of decreeing death" is "truly awesome". Lockett v. Ohio, 98 S. Ct. 2954, 2961. Those who have that responsibility should know they do. [24]

Both the Georgia Supreme Court and this Court have recognized, in other contexts, that a death penalty jury may decide differently depending on whether or not it believes its work controls. Thus, in Georgia, death sentences have been reversed where the prosecutor argued to the jury that its decision would be reviewed on appeal. Similarly, in Dobbert v. Florida, 432 U.S. 282 (1977), Mr. Justice Rehnquist's opinion for the Court reasoned (in rejecting an argument based on change in the Florida law) that

> ...The jury's recommendation may have been affected by the fact that the members of the jury were not the final arbiter of life and death. They may have chosen leniency when they knew that that decision rested ultimately on the shouldgers of the trial judge, but might not have followed the same course if their vote were final. 423 U.S. at 294, n, 7.

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[23] Ga. Code Ann. § 27-2514; see Mason v. State, 236 Ga. 46, 222

[24] As is indicated by Profitt v. Florida it is not constitutionally required that a jury make the death decision. But what is required is that whichever person or body in fact has that awesome responsibility should know that its decision will determine the sentence.

Not only does the actual verdict ask the jury only to "recommend"[25] but the jury instructions consistently refer that the jury shall "recommend"[26] and the prosecutor consistently talks of the power of the jury to "recommend" both in opening and closing arguments.[27]

A fortiori, where, as here, the jury was erroneously led to believe that the trial judge would be the "final arbiter" it "may" have been more willing to "ask" for death.

The instinct to wash one's hands of life or death decisions is as old as Pontius Pilate. No doubt the Members of this Court have themselves felt the difference between the discussion of death and the decision to put someone to death. Perhaps the difference cannot be scientifically proven, but the risk is nonetheless real. And in this country we do not let the courts take risks with life.

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[25] 2d Tr. p. 364; Tr. p. 285.

[26] 2d Tr. pp. 355, 356, 357, 358.

[27] 2d Tr. pp. 87, 88, 97, 290, 291 (twice), 315.

VI.

CONTRARY TO THIS COURTS EXPECTATIONS AS EXPRESSED IN GREGG, THE GEORGIA COURTS HAVE NOT NARROWED THE VAGUE AND OVERBROAD STATUTORY AGGRAVATING CIRCUMSTANCE USED AGAINST PETITIONER. THUS, HIS DEATH SENTENCE WAS, FOR THAT ADDITIONAL REASON, THE UNCONSTITUTIONAL RESULT OF UNFETTERED JURY DISCRETION.

Under the Georgia statutory scheme, the jury must find at least one "aggravating" circumstance before a death sentence can be imposed. The jury here found the seventh of the circumstances enumerated in the statute, and that circumstance is unconstitutionally vague and overbroad.

The seventh aggravating circumstance provided for in the Georgia statute, and found by the jury here, is that the offense be

> "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code Ann. § 27-2534. 1(b) (7).

This Court recognized in Gregg that this language could be construed to cover any murder, a construction which would clearly make the provision overbroad. 428 U.S. at 201.[28] This court assumed, however, that the Georgia courts would narrow the provision's facially overbroad language. That assumption was supported, the plurality reasoned, by McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974), the only pre-Gregg decision upholding a jury's death sentence based solely on the seventh aggravating circumstance. That case was characterized by this Court as a "horrifying, torture murder", 428 U.S. at 201.

Contrary to this Court's expectations, the seventh circumstance has not been narrowed. Rather, the Georgia Supreme Court has, in its decisions since Gregg and in this case, left the provision's application to the unguided discretion of juries.

Within two weeks of this Court's decision in Gregg, the Georgia Supreme Court discussed the seventh circumstance in

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[28] McCorquodale involved the strangulation of a 17 year old female victim after the defendant had, over a substantial period, beat, whipped, burnt, bit and cut his bound victim, put salt in her wounds, and sexually abused her.

Banks v. State, 237 Ga. 325, 227 S.E.2d 380 (1976), cert. denied, 430 U.S. 975 (1977). Dividing 4-2 (with the seventh justice voting to hold Georgia's death penalty generally unconstitutional), the court held that the jury's finding of the seventh circumstance was supportable where the two victims were each successively shot, first in the back and then, after time for reloading, again in the head. This time interval involved was said to permit a finding of "torture to at least one of the victims" as well as "depravity of the mind" 227 S.E. 2d at 382. In dissent, Justice Hill stated

> In my view, the majority in this case has now adopted an open-ended construction on ground 7 and has placed at least that ground of our statute in peril of being held invalid as being vague and overbroad and thus capable of capricious and unconstitutional application. Id. at 384.

Thereafter, in Harris v. State, 237 Ga. 718, 230 S.E. 2d 1 (1976), cert. denied, 431 U.S. 933 (1977), the Court simply noted that the terms used inthe seventh circumstance were defined in "ordinary dictionaries, Black's Dictionary, or Words and Phrases". 230 S.E. 2d at 10. Although the court stated that it had "no intention" of allowing the circumstance to become a "catchall", its reference to the dictionaries and legal phrase books (a) indicates a lack of appreciation of Gregg's expectation that narrowing would occur, and (b) would hardly be of help to juries without explanatory instructions.

Here, the jury was given no guidance whatsoever on any of the many broad terms.

Apart from the failure to explain or narrow the terms "torture", "depravity of mind", "aggravated battery", "outrageously or wantonly", "vile", "horrible", or "inhuman", and the concomitant risk that the jury in its unbridled discretion could apply the words to "any murder", there lurks the suspicion that the use of this aggravating factor was designed to inflame the jury so as to assist the prosecution in arguing the first aggravating circumstance of rape.

Because of Georgia's failure to place meaningful limits on it, the seventh circumstance can now be classed as too vague under the due process clause generally - an issue expressly not reached in Gregg, 428 U.S. at 201 n. 51 - as well as too vague under the Eighth Amendment as incorporated in the Fourteenth. Here, as in Grayned v. City of Rockford, 408 U.S. 104 (1972), vagueness means that "basic policy matters" are impermissibly delegated to judges and juries for "resolutions on an ad hoc and subjective basis" with the "attendant dangers of arbitrary and discriminatory application". Id., at 108-109. Where, as here, the "matter" is life or death and where it appears that the Georgia courts have not carried out this Court's assumptions about safeguarding against "arbitrary and discriminatory" executions, further review by this court is called for.

VII.

THE GEORGIA SUPREME COURT ALSO HAS ABANDONED THE APPELLATE REVIEW PROCESS WHICH WAS ASSUMED BY THIS COURT IN GREGG TO BE AN IMPORTANT CONSTITUTIONAL SAFEGUARD.

The Georgia mandatory appeal process was assumed in Gregg to be a necessary part of avoiding arbitrary and capricious, and thus unconstitutional, imposition of the death penalty. 428 U.S. at 198, 201 (plurality opinion), and at 222-23 (opinion of Mr. Justice White).

Particularly singled out, and relied upon, by this Court was the requirement that the Georgia Supreme Court must determine:

> ...whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Ga. Code Ann. § 27-2537 (c) (3).

To implement that requirement, the Geogia Supreme Court is required to "include in its decision a reference to those similar cases which it took into consideration." Ga. Code Ann. § 27-2537 (c).

In this case (and generally since Gregg) the Georgia Supreme Court has rendered meaningless that "important additional safeguard against arbitrariness and caprice" 428 U.S. at 198, which this Court had relied upon.

First, the expectation of this Court - and the practice of the Georgia court prior to Gregg (see Mr. Justice White's opinion at n. 5) - was that the sentence under attack would be compared not only against other death sentences but also against comparable cases in which death was not imposed. But here, in every single one of the 16 cases listed in the appendix to the Geogia court's decision, the death penalty was imposed.

Second, at the time of Gregg, as Mr. Justice White stated, there was no support for Gregg's contention that the Georgia court would consider only cases in which an appeal was taken. 428 U.S. at 223, n. 11. But now, in this case, that court has conceded (p.14 of slip opinion) that it only compared cases in which appeals were taken.

Third, it was assumed in Gregg that the Georgia court would, as required by the statute, compare other cases not only based upon the nature of the crime, but also based upon the defendant. The plurality opinion assumed that the court "compares each death sentence with the sentences imposed on similarly situated defendants" 428 U.S. at 198. Nothing suggests that was done. Indeed it is clear it was not.

Fourth, neither here - nor in any other death case since Gregg - has the Georgia court given the slightest hint as to the standards it is applying in comparing cases. Simple ipse dixits do not serve as an "important additional safeguard" to prevent arbitrariness and caprice.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Georgia.

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June 21, 1979

78-6891

In the Supreme Court of Georgia

Decided: JAN 24 1979

34193. DAVIS v. STATE

BOWLES, Justice.

The appellant, Freddie Davis, was indicted by a Grand Jury in Meriwether County for the January 31, 1977, rape and murder of Frances Coe. He was tried by a jury and found guilty of both offenses. Appellant was sentenced to death for the murder and was given a life sentence for rape.

In Davis v. State, 240 Ga. 763 (243 SE2d 12) (1978), appellant's convictions and life sentence for rape were affirmed. Because the court's sentencing instructions failed to make clear to the jury that they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance (Fleming v. State, 240 Ga. 142(7) (240 SE2d 37) (1977)); and failed to inform the jury that they were authorized to consider mitigating circumstances in contravention of requirements laid down in Code Ann. §§ 27-2534.1(b) and 27-2534.1(c) (Hawes v. State 240 Ga. 327(9) (240 SE2d 833) (1977)), appellant's sentence of death for the offense of murder was reversed and a new trial ordered on the issue of punishment.

Upon resentencing, the jury found that the murder was committed while the appellant was engaged in the commission of another capital felony, to-wit: the rape of Frances Coe, Code Ann. § 27-2534.1(b)(2) and, that the murder was outrageously and wantonly vile, horrible and inhumane in that it involved torture and depravity of mind on the part of the appellant, or an aggravated battery to the victim. Code Ann. § 27-2534.1(b)(7). Based upon these aggravating circumstances, a verdict was returned for the death penalty and appellant was sentenced to death.

This case is here on direct appeal and for mandatory review of the death sentence imposed. Code Ann. § 27-2537. The facts surrounding the murder and rape of Frances Coe are adequately set forth in Davis v. State, supra, and the companion case of co-indictee, Eddie Spraggins, (Spraggins v. State, 240 Ga. 759 (243 SE2d 20) (1978)), and will be repeated here only as necessary in addressing appellant's enumerations of error.

1. In his first enumeration of error, the appellant contends that the court reporter's failure to transcribe all hearings on

motions and all bench conferences held in the case renders the subsequently imposed death sentence unconstitutional.

Prior to trial, appellant filed a "Motion for Complete Recordation of all Proceedings" which was granted by the trial court. Although appellant argues he did not receive a complete recordation of all proceedings as moved, the transcript reveals that the jury voir dire, opening and closing statements of counsel, testimony of all witnesses in the case, and the court's charge to the jury were fully recorded and transcribed. Further, the record reveals that the only bench conference held was at the close of evidence prior to defendant's presentation of extenuating and mitigating circumstances.

Recently, in Stephens v. Hopper, 241 Ga. 596(2) (247 SE2d 92) (1978), this court held that a court reporter's failure to transcribe the closing arguments of counsel does not automatically require the death penalty to be set aside unless the defendant demonstrates harm or prejudice resulting from the court reporter's failure to transcribe the closing arguments.

In the present case, although appellant argues that the court reporter's failure to transcribe all hearings on motions

and all bench conferences held constitutes reversible error, nowhere in his brief does he point to anything harmful or prejudicial which may have occurred at any of these unrecorded proceedings. Therefore, we find appellant's first enumeration of error to be without merit.

2. Appellant's second enumeration of error contends that the trial court erred in its denial of appellant's motion to remove the trial to a proper courtroom.

This same point was raised by appellant in his previous appeal to this court and found to be without merit. Davis, supra, at division 2. There is no showing that the resentencing trial was conducted in a manner not befitting a judicial body and, therefore, for the reasons as set out in Davis, supra, we find no error.

3. In enumerations of error numbers three and four appellant contends that the trial court erred in permitting a witness for the prosecution to remain in the courtroom after a timely request for sequestration had been made, and, in refusing to direct that he be called as the State's first witness in the case.

The witness involved was the chief investigating officer. He was familiar with the case and the prosecutor stated in his place that he needed the witness' assistance during the trial. In response to appellant's motion to require the investigating officer to testify as the first witness in the case, the prosecutor stated that the testimony would be out of order if this witness was required to testify first.

Although Code Ann. § 38-1703 provides for the sequestration of witnesses upon motion by a party, a trial court is vested with the discretion to make exceptions to this rule, and unless that discretion has been abused, a trial court's decision will not be reversed by this court on appeal. Disby v. State, 238 Ga. 178(1) (231 SE2d 763) (1977); Jarrell v. State, 234 Ga. 410(6) (216 SE2d 258) (1975); Fountain v. State, 228 Ga. 306(3) (185 SE2d 62) (1971). In McNeal v. State, 228 Ga. 633(4) (187 SE2d 271) (1975, we found no abuse of discretion in the trial judge allowing an investigating officer to remain in the courtroom and testify after other witnesses in the case.

In the case sub judice, a proper foundation for an exception to the sequestration rule was made and, therefore, we find no

abuse of discretion by the trial judge in allowing the investigating officer to remain in the courtroom and in refusing to direct that he be called as the State's first witness.

Appellant's enumerations of error numbers three and four are without merit.

4. In his fifth enumeration of error appellant contends that the trial judge erred in overruling his objection to the admission in evidence of photographs taken at the scene of the crime depicting the victim's wounds.

These same photographs were held to be admissible in appellant's earlier appeal. Davis v. State, supra, at 766-767. The photographs complained of were relevant and material to show the manner in which the victim had been killed and raped. Such photographs are admissible. McCorquodale v. State, 233 Ga. 369(5) (211 SE2d 577) (1974); Floyd v. State, 233 Ga. 280, 283 (210 SE2d 810) (1974); Moore v. State, 240 Ga. 807 (243 SE2d 1) (1978).

5. Appellant's sixth enumeration of error contends that the trial court erred in overruling his objection to the admission of statements made by appellant regarding his participation in the murder and rape of the victim.

The appellant made three statements to law enforcement officers. Appellant was not in custody when the first two statements were made. The third statement was made after appellant was arrested and placed in custody.

The first two statements made by the appellant were clearly admissible in evidence as statements made prior to any in-custodial interrogation. Shy v. State, 234 Ga. 816 (218 SE2d 599) (1975); Davis v. State, 135 Ga. App. 584(5) (218 SE2d 297) (1975). In regard to the third statement, the trial court held a Jackson-Denno hearing to determine its admissibility. At that hearing, G.B.I. agent Davis testified that prior to making his third statement, appellant was advised of his Miranda rights. G.B.I. agent Davis further stated that no threats, promises, coercion or other improper conduct which would void the statement were made. Following his testimony, the trial court ruled that the statement was freely and voluntarily made, and, therefore, admissible.

Unless factual and credibility findings of a trial court in determining the voluntariness of a defendant's statement or confession are shown to be clearly erroneous, those findings must be accepted by this court. Natson v. State, 242 Ga.

(1978); Hurt v. State, 239 Ga. 665(2) (238 SE2d 690) (1977); Johnson v. State, 233 Ga. 58 (209 SE2d 629) (1974).

We have carefully reviewed the evidence submitted to the trial judge in this case and find that his determination was not clearly erroneous. We will not disturb his ruling.

Notwithstanding, appellant argues that his third statement was inadmissible because appellant was not told why he was placed under arrest at the time of his making that statement. The same contention was raised by appellant in his first appeal to this court and found to be without merit because appellant's second statement indicated that he "knew he was under investigation at the time of his arrest and third statement." Davis, supra, at 766. For this reason, we find appellant's argument again without merit.

Further, the appellant contends that all of the statements made by him were immaterial and irrelevant as they had no bearing on the sentencing phase of trial. This contention is without merit because in the sentencing phase of trial the jury, in reaching a determination of the sentence to be imposed, is authorized to consider all the facts and circumstances of the case including all statements or confessions made by the appellant.

Appellant's sixth enumeration of error is, therefore, without merit.

6. In his seventh enumeration of error appellant contends that the trial court erred in overruling his motion for mistrial after G.B.I. agent Davis testified that he had arrested the appellant as a result of a conversation with co-indictee Eddie Spraggins.

At trial, the prosecutor asked G.B.I. agent Davis why the appellant was placed under arrest. The witness replied "As a result of the conversation with Eddie Spraggins where I learned how Freddie had induced Eddie into killing Frances Coe." Following appellant's motion for mistrial, the trial court instructed the jury that any reference made by G.B.I. agent Davis during his testimony concerning a confession, admission or statement by a co-conspirator was to be considered in order to explain conduct or motive and for the purpose of explaining why agent Davis arrested the appellant.

Although the out of court statement of co-defendant Spraggins implicating appellant constitutes hearsay, the statement was not admitted to prove the truth of the matter asserted, but rather to

explain why the investigating officer in the case arrested the appellant. Such testimony is admissible under Code Ann. § 38-302. Teal v. State, 234 Ga. 159 (214 SE2d 888) (1975); Watkins v. State, 231 Ga. 481 (202 SE2d 442) (1973). The trial court properly instructed the jury to consider the witness' testimony for the limited purpose for which it was introduced.

Appellant's seventh enumeration is, therefore, without merit.

7. In his eighth enumeration of error appellant contends that the trial court erred in allowing the State, over appellant's objection, to reopen its case in order to present the testimony of co-indictee Eddie Spraggins.

After the defense rested, the prosecution moved to reopen its case stating "At the time I announced that I rested, I did not know at that time for sure whether or not Eddie Spraggins would be available to testify and would testify. He is willing to testify about what happened that night and I would like to put him on for that purpose." The trial court granted the prosecution's motion allowing the State to present additional evidence on direct, not rebuttal, recognizing that "Any relevant evidence that could be presented to this jury so they can reach a valid and just verdict should be heard..."

"Reopening evidence is in the sound discretion of the trial court and will not be disturbed when no abuse of discretion is shown. Mobley v. State, 221 Ga. 716 (146 SE2d 735) (1966); Britten v. State, 221 Ga. 97(4) (143 SE2d 176) (1965); Miller v. State, 226 Ga. 730 (177 SE2d 253) (1970)." Hurt v. State, 239 Ga. 665(8) (238 SE2d 542) (1977).

No abuse of discretion has been shown in this instance, and, therefore, we find appellant's enumeration of error to be without merit.

8. Appellant's ninth enumeration of error contends that the trial court erred in overruling his motion to strike the testimony of co-indictee Eddie Spraggins. Appellant argues that because Spraggins admitted, on cross-examination, that he had not told the truth at his trial held two days earlier concerning his participation and that of appellant in the murder of Frances Coe, a showing had been made that Spraggins failed to understand the meaning of his oath and as such was incompetent to testify at appellant's trial.

The jury is the exclusive arbiter of the weight and credibility to be given the testimony of a witness. Dean v. State,

238 Ga. 537 (233 SE2d 789) (1977); Wilkerson v. State, 233 Ga. 798 (213 SE2d 663) (1975). See also, Code Ann. § 38-1805.

The trial court properly charged the jury concerning impeachment, credibility and the weight to be given the testimony of all witnesses and, it was up to the jury to determine, in light of the court's instructions, whether the testimony of Eddie Spraggins was to be believed.

9. In his final enumeration of error, appellant contends that the trial court erred in charging the jury concerning parties to a crime. Code Ann. §§ 26-801 and 26-802. Appellant argues that the jury's only function was to determine sentence, not guilt or innocence, and, therefore, such a charge was prejudicial in that the jury could infer from the charge given that appellant's punishment should be the same as that which co-indictee Spraggins had received.

As we read the charge it was beneficial to appellant in that the jurors were made aware of the fact that more than one person had participated in the crime. Such a charge permitted the jury to consider this as a mitigating circumstance should they have found that appellant's participation was not as severe as that of co-indictee Eddie Spraggins.

Further, during the sentencing phase of trial, the jurors were entitled to know the exact role appellant played in the murder, and, therefore, were properly instructed that more than one person may have been involved in the commission of the offense for which the appellant was charged. With this in mind, the jury could assess the degree of appellant's participation and could determine, in view of co-indictee Spraggins' testimony, whether the appellant should be accorded mercy.

The charge on parties to a crime was a correct statement of the law, was called for under the facts and was relevant and material to a determination by the jury of the sentence to be imposed.

Appellant's enumeration of error is, therefore, without merit.

10. Sentence Review. Our sentence review has included consideration of the aggravating circumstances found by the jury and the evidence introduced in court concerning the crime and the defendant. After a thorough review of the record and transcript of trial, we conclude that the sentence of death imposed on Freddie Davis was not imposed under the influence of passion,

prejudice or any other arbitrary factor. (Code Ann. § 27-2537(c)(1)).

The jury found the following statutory aggravating circumstances: (1) "The offense of murder was committed while the offender was engaged in the commission of an additional capital felony, to-wit: the rape of Frances Coe" (Code Ann. § 27-2534.1(b)(2)). (2) "The offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim." (Code Ann. § 27-2534.1(b)(2)). Both of these statutory aggravating circumstances are supported by the evidence. Code Ann. § 27-2537(c)(2)). We find no double jeopardy violation in submitting an additional aggravating circumstance to the jury for its consideration at the resentencing trial. Redd v. State, ___ Ga.___) (Case No. 34020, January 4, 1979).

Further, we have reviewed the instructions of the trial court during the sentencing phase of appellant's trial and find that the charge as given was not subject to the defects dealt with in our decisions in Fleming v. State, supra, and Hayes v. State, supra.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed for murder, and we

APPENDIX

House v. State, 232 Ga. 140 (205 SE2d 217) (1974);

Gregg v. State, 233 Ga. 117 (210 SE2d 659) (1974);

Floyd v. State, 233 Ga. 280 (210 SE2d 810) (1974);

Chenault v. State, 234 Ga. 216 (215 SE2d 223) (1975);

Smith v. State, 236 Ga. 12 (222 SE2d 308) (1976);

Birt v. State, 236 Ga. 815 (225 SE2d 248) (1976);

Coleman v. State, 237 Ga. 84 (226 SE2d 911) (1976);

Isaacs v. State, 237 Ga. 105 (226 SE2d 922) (1976);

Dungee v. State, 237 Ga. 218 (227 SE2d 746) (1976);

Banks v. State, 237 Ga. 325 (227 SE2d 380) (1976);

Young v. State, 239 Ga. 53 (236 SE2d 1) (1977);

Gaddis v. State, 239 Ga. 238 (236 SE2d 594) (1977);

Peek v. State, 239 Ga. 422 (238 SE2d 12) (1977);

Bowden v. State, 239 Ga. 821 (238 SE2d 905) (1977);

Westbrook v. State, Ga. (SE2d) (1978) (Case No. 33523 decided September 5, 1978);

Finney v. State, Ga. (SE2d) (1978) (Case No. 33780 decided October 16, 1978).

find the similar cases listed in the appendix support affirmance of the death penalty.

Freddie Davis' sentence to death for murder is not excessive or disproportionate considering both the crime and the defendant. (Code Ann. § 27-2537(c)(3)). The verdict is factually supported.

Judgment affirmed. All the Justices concur.

HILL, Justice, concurring.

At defendant's first trial, only one aggravating circumstance was submitted to the jury for its consideration, and the jury imposed the death penalty on that ground, namely that the murder was committed while the defendant was engaged in the commission of another capital felony. On appeal, that death penalty was set aside due to insufficient jury instructions. Davis v. State, 240 Ga. 763 (243 SE2d 12) (1978).

At the resentencing trial, two aggravating circumstances were submitted to the jury and they found both, namely that the murder was committed while the defendant was engaged in the commission of another capital felony and that the murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim.

In reviewing the death penalty as provided by statute, Code Ann. § 27-2537(a)(b)(i), we must determine whether it is permissible to add an aggravating circumstance at the resentencing trial as was done here and as was done in Redd v. State, No. 34020, ____ Ga. ____ (SE2d) (1979) (see footnote 2).

I conclude that it is permissible to add previously omitted aggravating circumstances at a resentencing trial. We impliedly approved such procedure, without discussion, in Arnold v. State, 236 Ga. 534 (224 SE2d 386) (1976), when we authorized a retrial on the issue of punishment (236 Ga. at 542). A retrial as to punishment in Arnold could only have been based upon a previously omitted aggravating circumstance. It is because of cases like Arnold that I find the use of previously omitted aggravating circumstances to be permissible.

In Arnold, the defendant was sentenced to death based upon one aggravating circumstance which was found on appeal to be unconstitutionally vague. Under those circumstances it would be necessary to permit the use at retrial of previously omitted aggravating circumstances, or else simply to impose a life sentence. Under such circumstances the use of previously omitted aggravating circumstances does not offend fundamental fairness and the other alternative (automatic life sentence) would be an unwarranted reward which could have an adverse impact. See North Carolina v. Pearce, 395 U. S. 711, fn. 18 (89 SC 2072, 23 LE2d 656) (1969).

I therefore find that previously omitted aggravating circumstances may be used at a resentencing trial and I concur in the judgment affirming the imposition of the death penalty in this case.

78-6891

In the Supreme Court of Georgia

Decided: FEB 21 1978

32619. DAVIS v. STATE

HILL, Justice.

This is a death case. Defendant Freddie Davis was convicted by jury in Meriwether County of murder and rape. He was sentenced to death for the murder and was given a life sentence for rape.

This case is a companion case to Spraggins v. State, #32605, decided this date, and although the trials were separate, the state's evidence was substantially identical as to material particulars and hence the basic facts are reported in the Spraggins opinion. Suffice it to say here that the victim's semi-nude, mutilated body was found in her bedroom.

At this trial, defendant Davis testified that he waited outside the victim's house for 20 or 30 minutes while Eddie Spraggins was inside, and that he (Davis) was afraid of Spraggins. The defendant admitted furnishing his knife to Spraggins and admitted throwing the knife away the next day. Evidence for the state had shown that when first interviewed by law enforcement officers, Davis had said he and Spraggins were together on the night of the murder, but at that interview we did not admit having knowledge regarding the murder. His second statement to officers was consistent with his trial testimony. In his third statement he admitted participating in the murder. Blood of Davis' type as well as of the victim's and Spraggins' was found in the bedroom.

The defendant urges seven enumerations of error.

1. The defendant argues that the trial court erred in allowing retained counsel only four days after arraignment to file defensive motions, and erred in denying the defendant's motion for continuance or postponement.

The defendant was arrested on February 3, 1977, and counsel was appointed for him that day. Defendant informed appointed counsel that he would retain counsel. Counsel was not retained, however, until February 23. At arraignment on February 25, counsel was allowed four days to file defensive motions. Trial commenced March 3, 1977, after Spraggins' trial.

The defendant did not point out to the trial court any defensive motion he would have made but was unable to make because of the four day time limit. He does not urge that on

the fourth day he moved for more time to file defensive motions. No abuse of discretion has been shown as to the requirement that defensive motions be filed within four days after arraignment.

Insofar as the motion for continuance is concerned, defendant seeks to urge on appeal that more time was needed for his counsel to study the subject of blood testing and typing, to study the autopsy report, to prepare to defend against the rape charge, and to prepare requests for charge. None of these topics was mentioned in defendant's motion for continuance. When the motion was argued, however, after the Spraggins' trial, several of them were urged as grounds for continuance. However, no showing was made on motion for new trial or on appeal as to how additional time would have benefited defendant or how the lack of time harmed him. Defendant does contend here that the evidence as to rape was circumstantial. At trial defense counsel told the jury that the state's evidence showed that there probably was a rape. In sum, no abuse of discretion has been demonstrated in the denial of the motion for continuance. Smith v. State, 235 Ga. 620, 621 (221 SE2d 41) (1975); Pulliam v. State, 236 Ga. 460, 462 (224 SE2d 8) (1976); Dobbs v. State, 236 Ga. 427 (224 SE2d 3) (1976).

2. The courthouse in Meriwether County was destroyed by fire about a year before the defendant's trial, which was held in a gymnasium. Defendant alleges that the trial court erred in denying his motion to remove trial to a proper courtroom. He urges that a death penalty case should not be conducted in undignified surroundings, with the judge sitting beneath a basketball net and spectators in the bleachers.

Code Ann. § 27-1101 provides as follows: "All criminal cases shall be tried in the county where the crime was committed, except cases in the superior courts where the judge is satisfied that an impartial jury cannot be obtained in such county. When he becomes thus satisfied, he may change the venue for the trial." See also Code Ann. § 2-4306. Code Ann. § 24-3004 contemplates that cases tried at places other than at a courthouse shall be valid. See Cook v. State, 119 Ga. 108 (3) (116 SE 64) (1903).

Although the acoustics inside were poor and the road outside was noisy, there is no showing that the trial itself was conducted in a manner not befitting a judicial body. We find no error here.

3. The defendant alleges that the trial court erred in overruling his objection to a leading question calling for a

conclusion asked by the state of one of its principal witnesses, an investigating officer. The question asked was: "Was there evidence that this house had been broken into or did it just appear whoever gained entry gained entry through the authorization or consent of Mrs. Coe?" The question is not leading. Insofar as it called for a conclusion or opinion, this was not the ultimate issue to be decided by the jury inasmuch as burglary was not charged, and the officer was an experienced investigator familiar with the facts. We find no error here.

4. The defendant asserts that the trial court erred in allowing the state, over defendant's objection, to present additional evidence during a Jackson-Denno hearing after the state announced it "rested." This, like many other matters relating to the conduct of the trial, is a matter which addresses itself to the discretion of the trial judge and we find no abuse of discretion here. Hobbs v. State, 229 Ga. 556 (4) (192 SE2d 903) (1972); see also Pierre v. State, 238 Ga. 126, 129 (231 SE2d 744) (1977), where we directed the trial court to reopen a Jackson-Denno hearing pending appeal.

5. The defendant made three statements to law enforcement officers. He was released after the first two statements and was not arrested until before the third statement. Shortly before making the third statement the defendant showed the officers where he had thrown the knife.

The defendant argues that his third statement was inadmissible because he was not told why he was under arrest at the time of making that statement. The defendant and the victim lived in the same neighborhood. His second statement and the investigation as to the location of the knife show that he knew he was under investigation for Miss Coe's murder at the time of his arrest and third statement. We find no error here. Collins v. Brierly, 492 F2d 735, 738-739 (3rd Cir. 1974), cert. den. 419 U. S. 877. See also Reeves v. State, No 32794 decided this date.

6. The defendant urges that the trial court erred in overruling his objections to photographs taken at the scene of the crime depicting the victim's wounds. Such photographs are admissible. McCorquodale v. State, 233 Ga. 369 (5) (211 SE2d 577) (1974); Floyd v. State, 233 Ga. 280, 283 (210 SE2d 810) (1974); Moore v. State, #32744, decided February 7, 1978.

7. Sentence review. The instructions to the jury during the sentencing phase of the trial were virtually identical to the jury instructions in Spraggins v. State, supra. For the reasons stated there, namely that the charge failed to comply with Fleming v. State, 240 Ga. 142 (SE2d) (1977), and Hawes v. State, 240 Ga. ____ (SE2d) (1977), we conclude that the jury was not adequately instructed regarding the imposition of the death sentence. Hence the penalty of death in this case must be vacated and a new sentencing trial allowed.

Judgment affirmed as to convictions; reversed as to the death sentence. All the Justices concur, except Jordan, J. who dissents to the reversal of the death sentence.

Jordan, Justice, dissenting.

I dissent to the reversal of the death penalty for the reasons set forth in my dissent in Redd v. The State, Case No. 32732, decided February 21, 1978.